

# Israel's Perfect Storm: Fighting Coronavirus in the Midst of a Constitutional Crisis

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## Introduction

The Covid-19 pandemic caught Israel in the midst of an unprecedented constitutional crisis. On March 2<sup>nd</sup>, 2020, Israelis went to the polls to vote for the [third time](#) within a year, after neither Benjamin Netanyahu nor Benny Gantz, both candidates for the role of Prime Minister (PM), were able to form a coalition and establish a government in either of the two previous elections. In addition, PM Netanyahu's criminal trial for three separate charges of corruption was scheduled to open on March 17th, 2020.

The legal measures examined below have thus been employed by an interim government. In general, measures taken by Israel can be classified as belonging to one of two categories: the first includes social distancing measures, which include restrictions of movement and gatherings. The second includes technological measures for tracking the whereabouts of individuals who tested positive to the coronavirus.

A notable characteristic of the Israeli management of the crisis is the growing reliance on the military and on national security agencies, with respect to both types of measures. The sections below will examine the measures taken, the concerns these measures raise, and the steps taken to address such concerns.

## Background

Under Israel's political system, elections to the Knesset (Israeli parliament) are held every four years. The government operates pursuant to the confidence of the Knesset, which implies that a candidate must command a simple majority of Members of the Knesset (MKs) in order to form a government. In December 2018, following a political crisis within the coalition, the coalition collapsed, and elections were scheduled for April 2019, seven months earlier than planned. However, no candidate was able to secure the required majority, which led to a second round of elections, in September 2019. The same situation recurred, and a third round of elections was held in March 2020. PM Netanyahu failed to secure a majority in these last elections, and the majority of MKs initially stated that they oppose his continued service as PM.

Significantly, the measures implemented by Israel to respond to the Covid-19 crisis were introduced by an interim government which has been governing without the

confidence of the Knesset. As a general rule, an interim government is expected to act in restraint, as it is not representative of the people's will. However, the Covid-19 crisis called for the use of exceptional measures.

In addition to the lack of a permanent government, a political dispute between the parliamentary majority and the Speaker of the Knesset led to a temporary shut-down of the Knesset and delay in the set-up of parliamentary committees. As a result, the initial steps taken by the government were taken without parliamentary supervision. This has since been rectified. In addition to the permanent parliamentary committees, a special committee dedicated to the Covid-19 crisis has been established and is currently overseeing the measures taken.

## **The Ongoing State of Emergency in Israel**

While many countries have declared a state of emergency following the Covid-19 crisis, in Israel a state of national emergency already existed. Article 38 of [Basic Law: The Government](#) states that the Knesset “may, of its own initiative or, pursuant to a Government proposal, declare that a state of emergency exists”. A declaration of a state of emergency by the Knesset may remain in force for up to a year. Israel declared a state of emergency upon its establishment in 1948, and despite critiques that claimed its cancelation is long overdue, it has been extended ever since.

In the context of the Covid-19 crisis, the state of emergency is relevant due to Article 39(a) of Basic Law which states that:

“[d]uring a state of emergency, the Government may make emergency regulations for the defense of the State, public security and the maintenance of supplies and essential services”.

Article 39(c) states that:

“Emergency regulations may alter any law, temporarily suspend its effect, or introduce conditions, and may also impose or increase taxes or other compulsory payments unless there be another provision by law”.

The emergency situation thus grants the government the authority to enact regulations that supersede Knesset legislation.

## **Restrictions on Movement and Social Distancing Measures**

Movement limitations were initially imposed by orders enacted pursuant to the [Public Health Ordinance](#), an ordinance enacted during the British Mandate, which entrusts government officials with significant power. On February 2<sup>nd</sup>, 2020, the Minister of health enacted the People's Health Order (the new Coronavirus House Isolation and Various orders) (Temporary Order), which imposed home isolation requirements on those arriving to Israel from specific countries. The order has since been since

several times, and [additional orders have been enacted](#) pursuant to the Ordinance to expand isolation requirements, restrict public gatherings, and shut-down schools.

On March 21<sup>st</sup>, the government employed its authority, referred to above, to enact emergency regulations, to restrict presence in public spaces, subject to narrow exceptions, limit work, commerce and public transportation, and define violations of the restrictions as offences. These restrictions have been updated and their scope expanded on an ongoing basis. Exceptions included in the first regulations, which allowed for outdoor exercise and communal prayer in public, were revoked in later amendments.

The distinction between the topics addressed by the Emergency Regulations and those addressed by orders enacted pursuant to the Public Health Ordinance is not strict, and a certain overlap exists, which renders the normative framework unclear. For example, the Ministry of Health issued an order that [limits demonstrations](#) to ten participants, despite the fact that the Regulations, which supersede orders, exclude demonstrations from the restrictions imposed, subject to keeping a required distance between participants.

Several issues are notable in this regard. The first is the holding of elections.

Elections in Israel took place on March 2<sup>nd</sup>, 2020. Special [polling stations](#) were set up for Israelis that were in self-quarantine, and the elections were held as planned.

The second important issue regards the operation of the Knesset. Article 7 of the Emergency Regulations (Novel Coronavirus – Restriction of Activity), 2020, enacted by the government, explicitly excludes the Knesset and MKs from the restrictions prescribed. However, the operation of the Knesset became a topic of controversy in mid-March, when Yuli Edelstein, the former Knesset Speaker, [adjourned the Knesset](#), despite the request of the majority of MKs to hold discussions, and refused to convene the Knesset for the purpose of electing a new Speaker and establishing parliamentary committees.

The dispute was, first and foremost, a political dispute, characterized by a power struggle between the Speaker and the majority of MKs. At least for the time being, the dispute has subsided, and the Knesset has resumed its discussions. Notably, however, public health arguments were also brought up as a justification for adjournment. Thus, [media outlets reported](#) that Edelstein, as well as PM Netanyahu and a number of the other ministers of the interim government, argued that MKs should “set an example” to the public and seize their meetings, which would result in a shut-down of the Knesset. It was also reported that the Edelstein sought, based on social distancing criteria, to impose restrictions on the number of members of the Organizing Committee, the parliamentary committee that is responsible for establishing other parliamentary committees, in a manner that will affects its political composition. While these attempts did not eventually materialize, with the exception of social-distancing restrictions placed by the Speaker on the mode of operations of parliamentary committees, they should serve as caution against the manner in which public health arguments can be employed and manipulated to advance political agendas.

The third notable issue is the operation of courts. On March 12<sup>th</sup>, 2020, Minister of Justice Amir Ohana amended the Court's Regulations to include a situation of a health emergency, and enacted an emergency order that [restricted](#) the operation of the courts, determining that they will operate in emergency mode and will only discuss urgent matters. The order was politically [contentious](#), in particular due to the fact due to the fact that PM Netanyahu's criminal trial was set to open on March 17<sup>th</sup>, 2020. Shortly after it was enacted, the opening of Netanya's trial was postponed to May 24<sup>th</sup>. However, Supreme Court President, Ester Hayut, published a letter which endorses the decision to minimize the courts' operation, citing the importance of deferring to public safety. The emergency mode was extended, for the time being, until April 16<sup>th</sup>, 2020. A [petition](#) challenging the partial closure of court has been filed to the Supreme Court. It was [rejected](#) due to lack of exhaustion of procedural remedies. A general petition challenging the amendment of the Court Regulations was deleted after the parties agreed to examine the possibility of addressing the issue by primary legislation after the Covid-19 crisis ends.

## Tracking and Surveillance

In addition to social distancing measures, the Israeli government sought to employ technology to track those who tested positive to coronavirus, in order to identify individuals who came into their close proximity. The relevant technology was developed for national security purposes and used by the military and by the General Security Service (the "Service"). As the technology itself is considered confidential, the government entrusted the task to the Service, rather than to the civil authorities.

The tracking measures were discussed upon the adjournment of the 22<sup>nd</sup> Knesset, shortly before the 23<sup>rd</sup> Knesset was sworn in. Due to the refusal of the relevant parliamentary committee of the 22<sup>nd</sup> Knesset to swiftly approve the measures, the government bypassed the need to receive such approval by enacting emergency regulations for a period of two weeks. The regulations are confidential, and thus their exact scope and content is unknown. A petition challenging the enactment of the regulations was filed to the Supreme Court, which delivered an interim decision that limited the authority of the Service to employ tracking measures until March 24<sup>th</sup>, 2020, subject to the establishment of parliamentary committees, including the Knesset Service Affairs Committee. Such committees were indeed established, and therefore the limitation did not come into force. The general petition against the tracking measures is still standing.

The Knesset Service Affairs Committee approved the employment of military cellular tracking technology pursuant to article 7(B)(6), of the [General Security Service Law](#), 5762-2002, which allows the service to perform "activities in any other area determined by the Government, with the approval of the Knesset Service Affairs Committee, which is designed to safeguard and promote State interests vital to the national security of the State". The authorization includes a sunset clause which determines that it will end on April 30<sup>th</sup>, 2020. The committee required the state to

examine less invasive alternatives during this period, and to present them to the committee. The information the Service is allowed to share with the Ministry of Health includes real-time locations of confirmed Covid-19 patients in the 14 days that preceded diagnosis and the personal details of individuals who came into “close contact” with such patients. The Ministry of Health will use this information to inform those who came in contact with a Covid -19 patient that they are required to enter isolation.

Media outlets reported additional initiatives to employ technological measures in the struggle against Covid-19, including an initiative of Minister of Defense Naftali Bennet to employ the controversial cyber security company NSO to assess the risks of infection and outbreak, including the risk of specific individuals to test positive for Covid-19. This initiative has encountered [objections](#) among MKs, who claimed it was incompatible with the right to privacy, and within the Ministry of Justice, which expressed concerns about transferring information about individuals collected by the Service to a private company.

## **Involvement of the Military and the General Security Service**

Cellular tracking is performed by the Service, and the details of the process are confidential. During the discussions of the Service Affairs Committee it was revealed that the breadth of information collected was wide, and the authorization limited the information that is to be transferred by the General Security Service to the Ministry of Health.

In addition, it was reported that the Military was called upon to improve data management and methodologies, and that non-armed soldiers will assist the police in enforcement of social distancing measures. The military was also employed to assist in imposing a closure on the Ultra-Orthodox city of [Bnei-Brak](#), an major epicenter of the outbreak. The situation in several Ultra-Orthodox cities and neighborhoods is especially severe, in part because of religious exemptions to social distancing restrictions, that were initially included, and have since been revoked, and in part due to initial non-compliance and lenient enforcement of restrictions. It has been reported that the military will be recruited to evacuate the elderly, manage these areas, and provide aid.

The involvement of the military and of the Service in the management of the crisis thus appears to be growing. While the expertise and logistical abilities of these bodies may render them effective, a plethora of issues may arise from entrusting them with tasks related to the management of a civilian crisis. Their engagement thus needs to be closely monitored.

## **Conclusion**

Four main observations can be made regarding Israel's response to the coronavirus crisis so far. The first is the concern that the crisis will be used as a disguise to

further the political goals of governmental actors that are not related to the crisis. The second, related concern, is that it may give rise to the use of measures that violate human rights, in particular, the right to privacy. The third observation regards the role of the military and of national security agencies in responding to the crisis. In Israel, the involvement of the military and the Service is growing as the crisis unfolds. The fourth observation regards the importance of review and supervision. Virtually all measures employed in Israel were reviewed by either a parliamentary committee, the Supreme Court, or both. This review, which is ongoing, affected the scope and length of measurements taken. It thus demonstrates the importance of maintaining effective institutions, including courts, throughout the Covid-19 crisis, and in ensuring ongoing review and supervision of measures taken, as a safeguard against both political abuse and violations of rights. Such supervision is particularly important when confidential instruments of national security are employed, and when civilian tasks are delegated to the military and national security agencies.

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